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No. 93-974

In the
Supreme Court of the United States

October Term, 1993

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,

Petitioners,

vs.

NAVCO and WILLIAM L. CALDWELL, III,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the ruling below--which correctly holds that the Fund's suit is barred because its cause of action arose in 1984 when it knew of its injury and the cause of that injury, and which is consistent with the decisions of this Court and the Courts of Appeal--require review by this Court?

2. Should this Court review the decision below which correctly rejects the Fund's equitable tolling argument?[1]

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1 All parties to the proceeding below are listed in the caption of the case. Neither of the respondents is a corporation.

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PRELIMINARY STATEMENT

Petitioners have not set forth a single ground for granting certiorari which merits serious consideration by this Court. The Court of Appeals correctly ruled that petitioners' cause of action arose in 1984, when the Fund knew of its injury and the cause of that injury--that is, "when the employers' debts to the pension plan

became over due." Pet. Appx., p. 5a. Even assuming that there had been some "concealment," as petitioners erroneously assert (Pet., pp. 15-19), the controlling statute (29 U.S.C. § 1451(f)(2)) provides a six-year limitations period in such circumstances. The Fund filed seven years after it discovered its cause of action. There is no need for review by this Court.

STATEMENT OF THE CASE

The relevant facts, which are summarized in the opinions of the district court and Court of Appeals, are as follows:

Petitioner Central States, Southeast and Southwest Areas Pension Fund and its Trustees (hereinafter collectively "the Fund") filed suit in May 1991 against respondents NAVCO, a California limited partnership, and William M. Caldwell, III (hereinafter collectively "Respondents"), as well as two other parties who were not parties to the appeal below. Pet. Appx., p. 14a. Respondents moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the ground that the cause of action alleged in the Fund's complaint is barred by the statute of limitations and therefore fails to state a claim upon which relief

may be granted. Pet. Appx., p. 13a. The district court granted Respondents' motion (Pet. Appx., p. 17a), and denied a subsequent motion to alter or amend the order granting Respondent's motion (Pet. Appx., p. 25a).

In its complaint, the Fund alleged that United States Bedding Company and The Englander Company (hereinafter collectively "the employers"), who are not parties to this action, were subject to collective bargaining agreements which require them to make contributions to the Fund on behalf of their employees. Pet. Appx., p. 13a. The Fund alleges that the employers withdrew from the Fund in January 1984 (by ceasing to have an obligation to contribute to the fund and by ceasing to make contributions to the Fund). See Pet. Appx., p. 3a. The Fund alleges that in April 1984 the Fund issued a demand for payment of withdrawal liability under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001-1461 ("ERISA"). Pet. Appx., p. 3a. The Fund alleges that the employers and Respondent NAVCO "were members of a group of trades or businesses under common control and are treated as a single employer for purposes of the assessment and collection of withdrawal liability" (Appx.

to Brief of Appellants (7 Cir.), p. 18), allegedly based on a provision of ERISA making affiliates jointly liable with the employer (29 U.S.C. § 1301(b)(1)).

In granting Respondents' motion to dismiss, the district court noted that under ERISA "[a]n action may be brought no later than three to six years after plaintiffs have discovered their cause of action or injury" (Pet. Appx., p. 15a), and that

> "Plaintiffs knew of their injury, nonpayment, and thus, this cause of action, when demand was made upon the Van Vorst Controlled Group and payment was not made by any Group members in June of 1984. See 29 U.S.C. § 1399(c)(2) (payment due within 60 days after demand). Plaintiffs should have filed this complaint by 1987, or, at the latest, by 1990."

Pet. Appx., p. 16a. The district court concluded:

> "When plaintiffs were aware that they had not been paid, they should have investigated and sued, within the statute of limitations period, those group members of which they were aware. Once the suit had been

instituted, discovery could have been conducted to determine the identities of the other members in time to join them within the limitations period."

Pet. Appx., pp. 16a-17a.

The Court of Appeals affirmed. On September 20, 1993, the Court of Appeals denied the Fund's petition for rehearing. Pet. Appx., p. 27a.

ARGUMENT

I. THE RULING BELOW--THAT THE FUND'S SUIT IS BARRED BECAUSE ITS CAUSE OF ACTION AROSE IN 1984 WHEN IT KNEW OF ITS INJURY AND THE CAUSE OF THAT INJURY--IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE COURTS OF APPEAL.

The Court of Appeals correctly ruled that the Fund's cause of action arose in 1984, when the Fund knew of its injury and the cause of that injury--that is, "when the employers' debts to the pension plan became overdue." Pet. Appx., p. 5a. The Court of

Appeals rejected the notion that the Fund's cause of action arose when it "discovered the identity of persons who might be required to satisfy those debts" (Pet. Appx., p. 5a):

> "Section 1451(f)(2) [of Title 29] states a 'discovery' rule, and a claim accrues under a discovery rule when the victim knows of his injury. The time begins even though the victim does not know that the injury is actionable. E.g., United States v. Kubrick, 444 U.S. 111, 119-22 (1979). . . . If a claim accrues even though the victim does not know that he has a legal entitlement to recover, the fact that the victim does not know who would be the right defendant cannot matter."

Pet. Appx., p. 5a. The Court of Appeal thus concluded:

> "Thus the six years began in 1984 and expired before [the] pension plan filed suit. The potential difference between § 1451(f)(1) and (2) need not detain us, because [the] pension plan 'discovered' the nonpayment immediately. Even the proviso to § 1451(f)(2), awarding six years from discovery in

the event of fraud or concealment, would not add a day to the six years available under § 1451(f)(1)."

Pet. Appx., p. 9a.

The Court of Appeal's ruling is entirely consistent with this Court's decision in United States v. Kubrick, 444 U.S. 111 (1979). In Kubrick, this Court held that a claim accrues under the Federal Tort Claims Act when the plaintiff knows the existence and cause of its injury. 444 U.S. at 113, 119-122. Here, the Fund's cause of action arose in 1984, when the Fund knew of its injury (unpaid withdrawal liability) and the governing cause of that injury (withdrawal of the employers from the Fund).[2]

There is no authority in conflict with the decision below on this point. The Fund erroneously asserts that the decision below

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2 The Fund determined in January 1984 that the employers ceased contributing to the Fund and were no longer under an obligation to contribute. Appx. to Brief for Appellants (7 Cir.), p. 18. On or about April 6, 1984, the Fund demanded payment. Id. at 19. The Fund never received any payment, which was due in June 1984 (60 days after demand (29 U.S.C. § 1399(c)(2))). Id. at 19.

Thus, this is not a case like Northern California Retail Clerks Pension Fund v. Jumbo Markets, Inc., 906 F.2d 1371 (9th Cir. 1990), where the pension fund did not know of its injury. See Pet., p. 18.

is in conflict with various Court of Appeals decisions purportedly holding knowledge of identity of a defendant may be essential to accrual of a cause of action where the defendant has concealed his identity. Pet., pp. 12, 17-18. But here the Court of Appeals correctly concluded that "[Respondents] Navco and Caldwell did not attempt to deceive the pension funds or induce them to defer suing."[3] Pet. Appx., p. 11a. Moreover, even assuming that there had been some concealment, section 1451(f)(2) provides that "in the case of fraud or concealment, such action may be brought not later than six years after the date of discovery of the existence of such cause of action." 29 U.S.C. § 1451(f)(2). As discussed above (supra, p. 4), the Fund discovered its cause of action in 1984, and failed to file suit within six years of its discovery.

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3 Thus, this is not a case like Barrett v. United States, 689 F.2d 324 (2d Cir. 1982), cert. denied, 462 U.S. 1131 (1983), where the Government had "actively covered up both its involvement in the affair and the nature of its misdeeds," in a "deliberate concealment of material facts relating to the Government's wrongdoing." 689 F.2d at 327-328. And, in Diminnie v. United States, 728 F.2d 301 (6th Cir. 1984), cert. denied, 469 U.S. 842 (1984), the court refused to extend a limitations period, holding that "the plaintiff must show fraudulent concelament of the critical facts before accrual will be postponed." 728 F.2d at 305.

Similarly, the Fund's argument that the decision is in conflict with Joyce v. Clyde Sandoz Masonry, 871 F.2d 1119 (D.C. Cir. 1989), cert. denied, 493 U.S. 918 (1959), is wholly without merit. The passage from Joyce quoted by the Fund expressly addresses only section 1399(b)(1), which the Joyce court notes does not specify a precise time limit for plans to demand payment after an employer's withdrawal, and instead "require[s] only that plan sponsors act 'as soon as practicable after an employer's complete . . . withdrawal.' 29 U.S.C. § 1399(b)(1)." 871 F.2d at 1126. Indeed, the Fund omits the immediately following discussion in Joyce, that directly contrasts section 1399(b)(1) with the express limitation periods for filing suit set forth in section 1451(f), which are at issue here. 871 F.2d at 1126.[4] As the Court of Appeals noted, section 1451(f)(1) affords a generous six-year limitations period for the very purpose of allowing pension funds an opportunity to investigate and pursue claims. Pet. Appx. pp. 6a-7a. The Fund simply failed to do so here.

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4 The Fund's additional argument that the ruling below "made 29 U.S.C. § 1451(f)(2) superfluous" (Pet., p. 22) is addressed in detail in the district court's opinion. Pet. Appx., pp. 23a-24a.

II. THE COURT BELOW CORRECTLY REJECTS THE FUND'S EQUITABLE TOLLING ARGUMENT.

The Court of Appeals correctly rejected the Fund's argument that the limitations period in this case was subject to equitable tolling. Pet. Appx., pp. 11a-12a. The Fund failed even to plead facts showing its due diligence.

> "[B]ecause 'statutes of limitation are vital to the welfare of society and are favored in the law,' the plaintiff who invokes the doctrine of fraudulent concealment will be 'held to stringent rules of pleading and evidence, "and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made."'"

Pinney Dock and Transport Co. v. Penn Cent. Corp., 838 F.2d 1445, 1465 (6th Cir. 1988), cert. denied, 488 U.S. 880 (1988). The Fund alleges no such facts in its complaint.

Thus, even accepting the allegations in the Fund's complaint "as true" (Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984), the Fund's suit is barred. The Fund's authorities are not to the contrary. In Richards v. Mileski, 662 F.2d 65 (D.C. Cir. 1981), for example, the complaint stated allegations of "due diligence more than sufficient to invoke the tolling doctrine." 662 F.2d at 73. And, in Connors v. Hallmark, 935 F.2d 336 (D.C. Cir. 1991), there were ample facts in the record showing due diligence. Here, the Court of Appeals correctly rejected the Fund's eleventh-hour attempt to add new facts in its petition for rehearing. Pet. Appx., p. 27a. An appellant may not use a petition for rehearing as an opportunity to introduce an affidavit addressing a matter that was not even pled in its complaint. See Fed. R. App. P., Rule 40(a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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